

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:	)		
	)		
<b>Thomas J. Reddin, et al.</b>	)	Examiner:	<b>Janvier, J.D.</b>
	)		
Serial No. <b>09/296,120</b>	)	Group Art Unit:	<b>3688</b>
	)		
Filed: <b>April 21, 1999</b>	)	Conf. No.	<b>7995</b>
	)		
For: <b>METHODS AND SYSTEMS FOR</b>	)		
<b>OCCASION BASED LIFESTYLE</b>	)		
<b>MARKETING</b>	)		

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**APPEAL BRIEF**

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Mail Stop Appeal Brief - Patent  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Attn: Board of Patent Appeals & Interferences

Dear Sirs:

Pursuant to 37 C.F.R. §1.192 and MPEP §1205, the Applicant submits this Appeal Brief to the Board of Patent Appeals and Interferences. A Notice of Appeal was filed on November 18, 2009. Pursuant to MPEP §1204.01, please credit the initial appeal brief fee of \$500.00 submitted on October 27, 2004. Please charge the additional \$40.00 and any other additional fees or credit any refund thereof to Deposit Account No. 19-5029.

**I. REAL PARTY IN INTEREST**

This application is assigned to The Coca-Cola Company. An assignment from the individual inventors to The Coca-Cola Company was recorded with the Patent Office at Reel 010077, Frame 0653 on July 6, 1999.

**II. RELATED APPEALS AND INTERFERENCES**

The Applicant previously appealed this case and filed an appeal brief on May 29, 2003. In response, the Examiner issued a new non-final office action on August 25, 2003. This matter was appealed again on October 27, 2004 and a new non-final office action was issued on September 7, 2006. A third appeal brief was filed on November 20, 2006. The Examiner's supplemental answer of December 5, 2008 raised a new ground of rejection such that a request to reopen prosecution was filed on January 30, 2009. The Board remanded the case in orders dated March 20 and April 6, 2009. A final office action was mailed on August 18, 2009. The appeal followed. The Applicant is not aware of any other related appeals or interferences.

**III. STATUS OF CLAIMS**

Claims 1, 2, 4-19, 21-23, 25-28, 30-45, and 59-66 are pending herein. All pending claims stand rejected. Claims 44 and 45 also have been objected to. Claims 3, 20, 24, 29, 46-58, and 67 have been cancelled. Claim 66 has been withdrawn.

**IV. STATUS OF AMENDMENTS**

No amendments were filed after the final office action of August 18, 2009.

## V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention of independent Claim 1 is, for example, directed towards marketing methods that are not dependant upon the price of the product. *See* page 16, lines 24-31. Specifically, Claim 1 concerns a method of promoting the selection of an item 10 by a predetermined type of consumer based upon consumer market data *and* consumer lifestyle data. The method includes the steps of storing the consumer lifestyle and market data (page 10, line 13 - page 11, line 18), storing a selection of messaging, brands, packaging, or merchandising associated with the item (the “occasion based marketing solution 550” of page 15, line23-32); determining one or more representative activities of the consumer based upon the lifestyle data via the processor in communication with the database (page 11, lines 20-35); determining one or more representative uses of the item by the consumer during the representative activities based upon the market data via the processor in communication with the database (page 12, lines 13-31); determining an association between the representative uses of the item by the consumer during the activities through the selection of messaging, brands, packaging, or merchandising via the processor in communication with the database (page 15, line 21 - page 16, line 23); and creating demand for the item by the consumer based upon the determined association. *See, e.g.*, Fig. 1. Several examples of the methods are shown in Figs. 7-13. The implementation and execution of these steps with respect to the database and processor are explained in detail at page 28, line 1 – page 29, line 25.

As shown in Fig. 7, for example, the item may be a beverage and the predetermined type of consumer may be a “home category manager”. (Page 11, line 3-18). The consumer lifestyle data may be based on demographic or socioeconomic information (page 10, line 25 - page 11, line 2; page 11, lines 30-34). Specifically, the data may be gathered via quantitative attitude and usage

studies as well as by quantitative segmentation studies. (Page 11, line 35 - page 12, line 2). The consumer market data may be based upon consumer interviews, transaction data, or otherwise. (Page 14, lines 4-14). The representative activity of the consumer may be dinner and the representative use of the item by the consumer during the activity may be as a “meal enhancer”. The step of creating demand by that consumer based upon the use during the activity includes the selection of brands, packaging, merchandising, and messaging as shown in Fig. 7. In other words, the demand is created by selecting the appropriate brands (Cola Brand A), the appropriate packaging (2 liter bottles), the appropriate merchandising (Cola Brand A bundled with frozen foods), and the appropriate messaging (“Complete Your Dinner With Real Refreshment” or “Cola Brand A and Lasagna”). A connection therefore may be made between the item and the use of that item by the particular type of consumer during the representative activity such that the item and the activity drive the sale of the item instead of merely the price of the item. *See* Fig. 8 (“I need Cola Brand A to complete my meal.”)

Dependent Claims 5-8 concern further limitations as to the predetermined type of consumer. In this case, the consumer is a home category manager. An example in terms of a home category manager with respect to representative activities, representative uses, and creating demand is shown in Fig. 7 (“Quick Meal Solutions”) and explained in detail at page 19, line 28 through page 22, line 21. This specific combination of solutions (brand, packaging, merchandising, and messaging) is explained in the context of the “when,” the “why,” and the “how”.

Dependent Claims 9-11 concern further limitations as to the predetermined type of consumer. In this case, the consumers are blue-collar adults and teens. These claims similarly relate to the “snack time” example found at Fig. 12 and described in the specification at page 26, lines 5-27.

Dependent Claims 14 and 15 concern creating demand by messaging that promotes the items as addressing a need associated with one or more uses or by associating the item with one or more activities. This step of creating demand through the selection of messaging that addresses a need associated with one or more uses is described in the specification at page 17, line 27 through page 18, line 2. “For example, the substance of the message **610** may explain how the beverage **20** may solve a consumer’s emotional or functional need or how the beverage **20** serves a purpose.” Various examples also are shown in Fig 7 and Figs. 9-13.

Dependent Claims 21-23 concern creating demand in the context of packaging. The selection of packaging in the context of the type of consumer or the type of shopping trip is described at page 16, lines 5-16. Likewise, each of the figures shows an example on the selection of different types of packaging.

Dependent Claims 25-28 concern creating demand by the selection of merchandizing, including the bundling of an item with a different item. The discussion of bundling can be found at page 17, lines 14-26. *See* Fig. 8 as well. Bundling creates an association in the consumer’s mind between the respective goods.

Dependent Claims 30-35 concern creating demand by the selection of messaging. Messaging is discussed in the specification at page 17, line 27 through page 18, line 28. As discussed, messaging includes both the substance of the message and the meaning of the message. Many different mediums are described from in store greeters to sensory experience such as the sense of smell.

Dependent Claims 36-43 concern determining the environment in which an item is offered, including a virtual environment and the nature of specific shopping trips. The various shopping environments are discussed in the specification at page 8, line 30 through page 10, line 11. These

environments include the traditional retail outlets as well as virtual outlets based on the Internet and otherwise. The manner in which a consumer selects an item is discussed (the “how”) in detail in the specification at page 13, line 20 through page 15, line 20. Consideration of the “how” focuses on what the consumer may seek to accomplish, on how long the consumer is in the environment, where in that environment the consumer may shop, whether the consumer may purchase the item 10 for immediate or future use, or whether the consumer may purchase the item 10 for individual, family, commercial or group use. Internet examples are found at page 26, line 29 through page 27, line 23 and at Fig. 13.

Dependent Claims 44 and 45 recite a computer-readable medium having computer-executable instructions for performing the steps recited in Claims 1 and 39 respectively. Claims 1 and 39 are described above. The use of such instructions is described in the specification at page 28, lines 24-31 and in the flow charts of Figs. 1, 7, and 9-13.

Independent Claim 59 recites a method for promoting the use of an item by a predetermined type of consumer. The method includes the steps of receiving consumer lifestyle data corresponding to the representative activities of the predetermined type of consumer (page 10, line 25 – page 11, line 2; page 11, lines 30-34); storing the data (page 28, lines 1-13); receiving the consumer market data corresponding to the representative uses of the item by the predetermined type of consumer (page 12, lines 22-31); storing the data (page 28, lines 1-13); receiving a selection of messaging, brands, packaging, or merchandising associated with the item and storing the data (page 15, line 21 – page 16, line 23); determining a relationship between the data corresponding to the representative activities of the consumer and the data corresponding to the representative uses of the item by the consumer with the selection of messaging, brands, packaging, or merchandising via a processor in communication with the database so as to increase demand of the item by the predetermined type of

consumer (page 28, lines 14-31); and storing the relationship in a marketing database (page 28, line 32 – page 29, lines 17). *See, e.g.*, Fig. 1. Several examples of the methods are shown in Figs. 7-13. The implementation and execution of these steps with respect to the database and processor are explained in detail at page 28, line 1 – page 29, line 25.

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

1. Claim 59-65 stand rejected under 35 U.S.C. § 101.
2. Claims 1, 2, 4-19, 21-23, 25-28, 30-45, and 59-65 stand rejected under 35 U.S.C. §102 (b) as being anticipated by U.S. Patent No. 5, 649,114 to Deaton, et al.
3. Claims 1 and 59 stand rejected under 35 U.S.C. §102 (e) as being anticipated by U.S. Patent No. 5, 974,396 to Anderson, et al.

## **VII. ARGUMENT**

### **A. Prosecution History**

This present application originally was filed with 66 claims, with Claims 1, 46, 53, 54, 58, 59, and 66 being independent claims. As filed, independent Claim 1 read as follows:

1. A method for promoting the selection of an item by a predetermined type of consumer, said method comprising the steps of:  
 determining one or more representative activities of said predetermined type of consumer;  
 determining one or more representative uses of said item by said predetermined type of consumer during said one or more representative activities;  
 and  
 creating demand for said item by said predetermined type of consumer based upon said one or more representative uses of said item by said predetermined type of consumer during said one or more representative activities.

The Examiner rejected all claims in an Office Action dated November 6, 2001. Claims 44, 45, and 58 were rejected under 35 U.S.C. §101; Claims 44 and 45 were rejected under 35 U.S.C.

§112; and Claims 1-66 were rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,649,114 to Deaton, et al.

Deaton largely describes a check verification system. The system, however, also provides for target marketing of customers based upon their shopping history. Deaton thus describes the use of point-of-sale coupons and other incentives provided to the customer. *See* Col. 7, lines 31-50. For example, Figs. 15A and B illustrate an infrequent customer program while Figs. 17A and B illustrate a point-of-sale coupon and direct mail coupon system. The coupons are either given at checkout or through the mail. Figs. 18A, B, and C show the use of scan product data. If the system determines that the customer is a frequent shopper but does not purchase coffee, the system may determine that a coffee coupon would be suitable. Col. 68, lines 44-48 and line 64 - col. 69, line 2 (“[t]he present invention differs from the systems disclosed in the above-identified patents because, among other things, the present system generates coupons based upon the lack of a purchase of a particular item by comparing against stored history for unique customer IDs, rather than because of the purchase of the item.”) On other items, the system considers the shopper’s history in determining when to issue a coupon. Col. 100, lines 47-63.

The Examiner stated that the step of determining one or more representative activities reads on Deaton’s use of customer purchase history data. Likewise, the step of determining one or more representative uses of the item by the customer during one or more representative activities also reads on the use of customer purchase history. Finally, the step of creating demand reads on tracking the products purchased by the consumer.

With respect to Claims 44 and 45, Claim 44 recites “a computer-readable medium having computer-executable instructions for performing the steps recited in Claim 1” while Claim 45



concerns the steps recited in Claim 39. The Examiner stated that these claims must be independent claims and objected thereto.

In a response mailed on December 11, 2001, the Applicant canceled Claim 58 and traversed the remaining rejections. With respect to the rejection under 35 U.S.C. §112, the Applicant pointed out that numerous claims in the form used herein have been allowed and that claims directed to computer executable instructions stored on a computer-readable media are considered to define patentable subject matter. With respect to the rejection under 35 U.S.C. §102(b) to Deaton, et al., the Applicant asserted that the Examiner strained the ordinary definition of the term “representative activities,” *i.e.*, “the when” of the invention. As opposed to the scan data analyzed in Deaton, the activities claimed herein and defined in the specification are those activities of a given consumer during a particular day. In this context, Deaton provides no disclosure relevant to the representative activities, the representative uses, or creating demand depending upon the activities and uses. For example, Deaton in no way describes using anything while shopping or any other activity.

In an Office Action mailed on April 2, 2002, the Examiner withdrew the rejection under 35 U.S.C. §101; maintained the rejection under 35 U.S.C. §112; and maintained the rejection under 35 U.S.C. §102. The rejection was made final. The Examiner then repeated the first Office Action in full.

The Applicant responded to the Final Office Action in a response mailed on June 3, 2002. The Applicant again stressed that there is no mention in Deaton of determining the uses of any type of product by the consumer during one or more representative activities as is specifically claims herein. Deaton does not promote using anything during, for example, during shopping. In an Advisory Action mailed on June 14, 2002, the Examiner stated that the response raised new arguments. The Applicant thus filed a Request for Continued Examination on July 2, 2002.

In an Office Action mailed on September 20, 2002, the Examiner maintained the §112 and the §102 rejections. The Examiner stated that he did not find persuasive the Applicant's argument that the disclosure of "purchasing data" does not read on the "representative activity of the predetermined type of the consumer" limitation, *i.e.*, the fact that "data" is not a "use". The Examiner instead argued that purchasing data are inherently associated with products or services brought for immediate or subsequent consumption. With respect to the argument that Deaton does not disclose the use of an item during one or more representative activities, the Examiner stated that such limitations also are inherently supported in the art or implicitly disclosed in the reference. The Examiner then repeated the first Office Action in full.

In a response mailed on December 9, 2002, the Applicant argued that the inherency argument is flawed in that the fact that a certain result or characteristic may occur is insufficient to maintain a rejection. The Applicant thus stressed that Deaton cannot establish (1) determining one or more representative activities of a consumer; (2) determining one or more representative uses of an item by the consumer during the representative activities; and (3) creating demand for the item by the consumer based upon the uses of the item during the representative activities. These limitation simply are not "necessarily present" in Deaton.

In an Office Action mailed on February 22, 2003, the Examiner maintained the section §112 and §102 arguments. With respect to the §112 argument, the Examiner stated that he does not comment on issued patents. The Examiner then repeated the first Office Action in full.

The Applicant thus filed a Notice of Appeal on March 31, 2003 and submitted its Appeal Brief on May 29, 2003. The Examiner issued a non-final Office Action on August 25, 2003. The Examiner maintained the prior rejection under Deaton, renewed some of the previously withdrawn rejections under §101 and added new rejections under §112, first paragraph. The Applicant

responded in an amendment and response dated November 20, 2003. The Applicant amended the claims to address the Examiner's newfound §112 issues. Specifically, the step of gathering consumer lifestyle and consumer market data was added; the means by which the representative activities and representative uses are determined was added; and the creating demand step was further limited to the selection of messaging, brands, packaging, or merchandising.

In a non-final Office Action mailed on January 27, 2004, the Examiner maintained the previous rejections and added, for the first time, a restriction requirement. The Applicant responded on March 16, 2004 with an election of claims and a partial traverse.

In a further non-final Office Action mailed on June 2, 2004, the Examiner made the restriction of Claim 66 final and repeated the previous rejections. The second appeal followed. The original brief was filed on October 27, 2004. In a Notice of Unacceptable Brief, the Examiner stated that the objections to Claims 44 and 45 and the restriction of Claim 66 do not include appealable subject matter and demanded that those arguments be removed. Several further Notices followed.

A further non-final office action was issued September 7, 2006. The previously withdrawn rejection of claim 59 under 35 U.S.C. §101 was reinstated. The rejection of all claims but Claims 44 and 45 under 35 U.S.C. §102(b) in light of Deaton was maintained. The objection to Claims 44 and 45 was maintained but no art was raised against the claims for the first time. A new rejection under 35 U.S.C. §102(e) was raised against Claims 1, 53, 59, and 67 in light of U.S. Patent No. 5,974,396 to Anderson. A third appeal brief was filed on November 20, 2006. The Examiner's supplemental answer of December 5, 2008, however, raised a new ground of rejection such that a request to reopen prosecution was filed on January 30, 2009. The Board remanded the case in orders dated March 20 and April 6, 2009. A final office action was mailed on August 18, 2009, now rejecting all claims under Deaton. The appeal followed.

## B. REJECTIONS

### 1. REJECTION UNDER 35 U.S.C. § 101 - CLAIMS 59-65.

The Examiner rejected Claim 59-65 under 35 U.S.C. §101 because they are not directed towards statutory subject matter in that Claim 59 does not produce a useful concrete and tangible result. Specifically, that “nothing was actually done with the relationship data.”

The Applicant respectfully submits that the rejection under §101 is in error. Claim 59 states as follows:

59. A method for promoting the use of an item by a predetermined type of consumer, said method comprising the steps of:  
 receiving consumer lifestyle data corresponding to representative activities of said predetermined type of consumer;  
 storing said data corresponding to said representative activities of said predetermined type of consumer in a marketing database;  
 receiving consumer market data corresponding to representative uses of said item by said predetermined type of consumer;  
 storing said data corresponding to said representative uses of said item by said predetermined type of consumer in said marketing database;  
 receiving a selection of messaging, brands, packaging, or merchandising associated with the item;  
 storing the selection of messaging, brands, packaging, or merchandising associated with the item in said marketing database;  
 determining a relationship between said data corresponding to said representative activities of said predetermined type of consumer and said data corresponding to said representative uses of said item by said predetermined type of consumer activities with the selection of messaging, brands, packaging, or merchandising via a processor in communication with the marketing database so as to increase demand of the item by the predetermined type of consumer; and  
 storing said relationship in said marketing database.

The Applicant questions whether the Examiner considered the amendments of January 30, 2009 in which the occasion-based marketing solutions of messaging, brands, packaging, or merchandising were added and stored. Likewise, the determining step was amended with the specifics of the occasion-based marketing solutions in the context of the processor and the database. Given this amendment, the Applicant submits that the claim easily provides such a “useful, concrete,

and tangible” result, *i.e.*, creating determining a relationship between activities, uses, and solutions and storing that relationship.

The Applicant further asserts that the claims clearly include statutory subject matter under 35 U.S.C. §101. The Federal Circuit made it clear in *In re Bilski*, 545 F.3d 943, 959-60) (Fed. Cir. 2008) (en banc), that the “useful, concrete and tangible result” inquiry is not adequate to determine statutory subject matter. Rather, under the “New Interim Patent Subject Matter Eligibility Examination Instructions” of August 24, 2009, a process claim is to be evaluated on (1) whether the claim requires that method be implemented by a particular machine and (2) whether the use of the particular machine imposes a meaningful limitation on the scope of the claim. Here, the database and processor are specifically asserted such that the first prong is present. Likewise, the use of the database and processor is not merely a field of use limitation. Rather, the data is being manipulated in the context of a relationship between activities, uses, and solutions in the context of promotion and demand with respect to a specific item and a predetermined type of consumer. *See Ex parte Casati*, No. 2009-005786 at 7 (B.P.A.I. July 31, 2009); *Ex parte Dickerson*, No. 2009-001172 at 15-16 (B.P.A.I. July 9, 2009). The Applicant thus asserts that Claims 59-65 contain patentable subject matter.

**2. REJECTION UNDER 35 U.S.C. §102 (B) OVER U.S. PATENT NO. 5,649,114 TO DEATON, ET AL.**

**a. CLAIMS 1, 2, 4-19, 21-23, 25-28, 30-45, AND 59-65**

As described above, Claim 1 states as follows:

1. (Currently amended) A method for promoting the selection of an item by a predetermined type of consumer based upon consumer lifestyle and consumer market data, said method comprising the steps of:  
storing the consumer lifestyle and the consumer market data in a database;

storing a selection of messaging, brands, packaging, or merchandising associated with the item;

determining one or more representative activities of said predetermined type of consumer based upon the consumer lifestyle data via the processor in communication with the database;

determining one or more representative uses of said item by said predetermined type of consumer during said one or more representative activities based upon the consumer market data via the processor in communication with the database; and

determining an association between said one or more representative uses of said item by said predetermined type of consumer during said one or more representative activities and the selection of messaging, brands, packaging, or merchandising via the processor in communication with the database;

creating demand for the item by said predetermined type of consumer based upon the determined association.

The Applicant respectfully submits that Deaton does not show *any* of the limitations of the claim other than gathering consumer market data. Specifically, Deaton does not show the limitations of storing the consumer lifestyle data, determining the representative activities of a predetermined type of consumer based upon the consumer lifestyle data, determining the representative uses of an item by the consumer during the activities based upon the consumer market data, or the step of creating demand for the item by the consumer based upon the uses of the item by the consumer during the activities through the selection of messaging, brands, packaging, or merchandising. The fundamental flaw in this rejection is that the customer scan data relied upon in Deaton simply is not the same consumer activity and use data described and claimed herein. The Applicant thus submits that all claims are patentable over Deaton.

#### **CONSUMER LIFESTYLE DATA**

Deaton does not show the use of anything that might be considered consumer lifestyle data. At best, Deaton is concerned with extensive use of various types of register data so as to provide coupons and similar discounts. *See Abstract*. The rejection, however, ignores this limitation and simply states that “market data include lifestyle data” or may be “inferred from the market data”.

(Page 5.) The Applicant submits that one cannot infer with any degree of accuracy that “the consumer belongs to a certain class or demographics, has a good paying job, lives in an expensive neighborhood, owns a house, has a college degree etc.” from the type of coffee or diapers that a consumer may purchase. The consumer lifestyle data limitation thus is missing from the reference.

### **REPRESENTATIVE ACTIVITIES**

The representative activities of the predetermined type of consumer are determined and stored in the context of the consumer lifestyle data and focus on typical day-to-day activities. For example, the specification describes numerous examples of such activities in the context of a beverage for specific types of consumers: “Quick Meal Solutions” (Fig. 7); “Shop Refreshed” (Fig. 9); “Social Events” (Fig. 10); “Drive Refreshed” (Fig. 11); “Snack Time” (Fig. 12); and “Internet Usage” (Fig. 13). Deaton, however, is completely silent on any type of activities of any type of consumer, other than (perhaps) shopping. Rather, Deaton simply discloses tracking a consumer’s shopping history. *See* Abstract. The Applicant submits that determining what a consumer *buys* is not the same as determining what a consumer *does* on a day-to-day basis.

The rejection, however, again “infers” such activities: “if a customer purchases a certain type of coffee brand, then the customer will prepare the drink while watching TV, talking to a friend on the phone, reading a newspaper, etc.” (Page 6.) The Applicant, however, cannot find any description in the reference on how these activities result from certain types of coffee as opposed to others types of coffee. In fact, the Applicant can find no discussion remotely similar to this inference. The representative activities limitation thus is missing from the reference.

### **REPRESENTATIVE USES**

The representative uses of an item by a consumer during an activity are determined in the context of the consumer market data. For example, the uses of a beverage disclosed herein include:

“Treat-Refreshment/Tide-Me-Over” (Fig. 9); “Socializers/Relaxers/Meal Enhancer” (Fig. 10); “Refreshment/Tide-Me-Over/Energizer” (Fig. 12); and “Refreshments/Energizer/Rejuvenation/Meal Enhancer” (Fig. 13). Deaton, however, is completely silent on how a consumer uses any particular item. Further, there is certainly no disclosure of how a consumer uses an item *during* one or more representative activities. Rather, Deaton only discloses tracking a consumer’s shopping history so as to determine when the customer may need to replace the product. Again, what a consumer *buys* does not disclose what the consumer *does* with the item. Even more so, what a consumer buys does not disclose what the consumer *does* with the item *during* a particular activity. This limitation thus is missing from the reference.

#### **CREATING DEMAND**

The demand for the item by the consumer is created in the context of an association between the determined uses of the item by the consumer during the determined activities through the selection of messaging, brands, packaging, or merchandising. No mention of messaging, brands, packaging, or merchandising, however, is found in the Deaton (or the Office Action). Rather, Deaton is focused on the timing and amount of issuing coupons to the consumer. *See* col. 71, lines 31-67. This reason alone is sufficient to allow the claims.

Even if these limitations were considered in any of the office actions, the Applicant submits that the reference clearly fails to anticipate the claims. In addition to the lack of any disclosure concerning messaging, brands, packaging, or merchandising, Deaton also is silent on creating demand for an item by the consumer based upon the uses of the item *during* one or more activities. Again, Deaton merely provides coupons or other incentives based upon a consumer’s shopping history. Deaton thus totally lacks a disclosure of creating demand in the context of the uses of the item during the representative activities.



### INHERENCY

The Applicant respectfully submits that neither the Examiner nor the Board can assert that Deaton discloses the elements claimed in Claim 1. Rather, this rejection appears to be more of an inherency argument. The crux of the Examiner's argument seems to be that by tracking the consumer's shopping history data, the nature of the use of the items purchased and the nature of the activities during which the items are used is somehow inherent. The Applicant respectfully submits that this conclusion is wrong as a matter of law and, further, still does not anticipate the limitation of creating demand for an item based upon how a consumer uses an item during a particular activity.

An inherency rejection is difficult to maintain. MPEP §2112 states as follows:

The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993) (reversed rejection because inherency was based on what would result due to optimization of conditions, not what was necessarily present in the prior art)

...

"In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teaching of the applied prior art." *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990).

In order to be a valid anticipation reference, therefore, the Examiner must show how the limitations of the claim are "necessarily" present in Deaton. At the very least, there can be no debate that there is no "necessary" disclosure in Deaton as to creating demand for an item based upon the uses of the item *during* any type of representative activities. In other word, there is nothing inherent in Deaton as to creating demand by connecting a beverage and driving or a beverage and after school time. The Applicant respectfully submits that the fact a consumer purchases an item proves nothing, inherently or otherwise, as to the uses of that product or the activities of the consumer while using

the product or the item. The Applicant therefore asserts that these claims are patentable over Deaton.

**b. CLAIMS 5-8**

This group of claims concerns further limitations as to the predetermined type of consumer. In this case, the consumer is a home category manager. Deaton is completely silent on the characteristics of a home category manager. The Applicant therefore asserts that these claims are patentable over Deaton.

**c. CLAIMS 9-11**

This group concerns further limitations as to the predetermined type of consumer. In this case, the consumers are blue-collar adults and teens. Deaton is completely silent on the characteristics of blue-collar adults and teens. The Applicant therefore asserts that these claims are patentable over Deaton.

**d. CLAIMS 14 & 15**

This group of claims concerns creating demand by messaging that promotes the item as addressing a need associated with one or more uses or associates the item with one or more activities. Deaton is completely silent on such messaging limitations. The Applicant therefore asserts that these claims are patentable over Deaton.

**e. CLAIMS 21-23**

This group of claims concerns creating demand in the context of packaging. Deaton is silent on creating or selecting packaging. The Applicant therefore asserts that these claims are patentable over Deaton.

**f. CLAIMS 25-28**

This group of claims concerns creating demand by the selection of merchandising, including bundling the item with a different item. Deaton is silent on such limitations. The Applicant therefore asserts that these claims are patentable over Deaton.

**g. CLAIMS 30-35**

This group of claims concerns creating demand by the selection of messaging. Deaton is silent on such limitations. The Applicant therefore asserts that these claims are patentable over Deaton.

**h. CLAIMS 36-43**

This group of claims concerns determining the environment in which an item is offered, including a virtual environment and the nature of specific shopping trips. Deaton is silent on such limitations. The Applicant therefore asserts that these claims are patentable over Deaton.

**i. Claims 44 and 45**

This claim concerns a computer readable medium having computer executable instructions for the steps of Claims 1 and 39. Deaton is silent on such a medium and the specific steps cannot be considered inherent. The Applicant therefore asserts that these claims are patentable over Deaton.

**j. CLAIMS 59-65**

This group of claims concern receiving and storing the data with respect to the representative activities and the representative uses of an item and then determining a relationship between the activities and the uses by the consumer, particularly in terms of a conversion rate and a profit margin. Again, Deaton only tracks consumer sales history data. Deaton is not interested in any type of relationship between the activities of a consumer and how a consumer uses an item during that

activity. Likewise, there is no determination of a conversion rate or a profit margin described in the reference. The Applicant therefore asserts that these claims are patentable over Deaton.

**3. REJECTION UNDER 35 U.S.C. §102 (E) OVER U.S. PATENT NO. 5, 974,396 TO ANDERSON, ET AL.**

Anderson was described as disclosing a method of gathering and analyzing consumer and purchasing information. The gathered information identifies a specific product by type and manufacturer and then groups the products into generic clusters. Likewise, customers are similarly grouped into consumer clusters based on consumer demographics and other characteristics.

The Applicant respectfully traverses the rejection. The “lifestyle” information referred to in the rejection relates to demographic information described as:

Information provided by the retail grocer’s consumer on the sign-up application.  
Includes demographic and psychographic data such as age, number of people in family, income, specific consumer products used in household, etc.

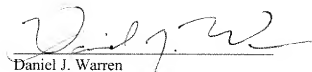
*See* Col. 13, line 59 - Col. 14, line 7.

Such information as age, number of people in household, and income simply does not read on the claimed steps of determining representative activities of a predetermined type of consumer or determining one or more representative uses of an item by that type of consumer during the activities. Similar to Deaton, the system of Anderson is largely based upon scanner data so as to determine buying pattern and to maximize those patterns. The claims herein, however, are directed towards creating demand. “[T]he product may be promoted and marketed based upon a purchasing trigger that represents activity-based consumer solutions rather than only price.” Page 2, lines 12-13. The Applicant thus respectfully submits that independent Claims 1 and 53 are patentable over Anderson.

#### VIII. CONCLUSION

The Applicant respectfully requests that the Board overturn the rejections of the claims. The Applicant submits that the claims are not anticipated by the disclosures of Deaton and Anderson, inherently or otherwise. Any questions may be directed to the undersigned at 404.853.8028.

Respectfully submitted, this 11th day of January, 2010.

  
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## APPENDIX A – CLAIMS ON APPEAL

1. A method for promoting the selection of an item by a predetermined type of consumer based upon consumer lifestyle and consumer market data, said method comprising the steps of:

storing the consumer lifestyle and the consumer market data in a database;

storing a selection of messaging, brands, packaging, or merchandising associated with the item;

determining one or more representative activities of said predetermined type of consumer based upon the consumer lifestyle data via the processor in communication with the database;

determining one or more representative uses of said item by said predetermined type of consumer during said one or more representative activities based upon the consumer market data via the processor in communication with the database; and

determining an association between said one or more representative uses of said item by said predetermined type of consumer during said one or more representative activities and the selection of messaging, brands, packaging, or merchandising via the processor in communication with the database;

creating demand for the item by said predetermined type of consumer based upon the determined association.

2. The method of promoting the selection of an item of claim 1, wherein said step of determining one or more representative activities of said predetermined type of consumer comprises analysis of said one or more representative activities within a predetermined length of time.

3. (Cancelled)

4. The method of promoting the selection of an item of claim 1, wherein said step of determining one or more representative activities of said predetermined type of consumer comprises analysis of the consumer lifestyle data.

5. The method of promoting the selection of an item of claim 1, wherein said predetermined type of consumer comprises a home category manager and wherein said one or more representative activities is an event selected from the group consisting of wake up, breakfast, in transit to work, in transit to school, morning break, lunch, afternoon break, after school snack, after school sports, after work workout, dinner, social events, evening snack, and shopping.

6. The method of promoting the selection of an item of claim 5, wherein said item comprises a beverage and wherein said one or more representative uses is a need selected from the group consisting of refreshment, lift, meal enhancer, socializer, re-hydration, relaxer, treat, and a tide-me-over.

7. The method of promoting the selection of an item of claim 6, wherein the selection of messaging comprises messaging directed to said home category manager suggesting use of said beverage as said meal enhancer with said dinner.

8. The method of promoting the selection of an item of claim 6, wherein the selection of messaging comprises messaging directed to said home category manager suggesting use of said beverage as said refreshment during said shopping.

9. The method of promoting the selection of an item of claim 1, wherein said predetermined type of consumer comprises blue-collar adults and teens and wherein said one or more representative activities is an event selected from the group consisting of after school, afternoon, and after work.

10. The method of promoting the selection of an item of claim 9, wherein said item comprises a beverage and wherein said one or more representative uses is a need selected from the group consisting of refreshment, energy, and a tide-me-over.

11. The method of promoting the selection of an item of claim 10, wherein the selection of messaging comprises messaging directed to said blue-collar adults and teens suggesting use of said beverage as said energizer during said afternoon.

12. The method of promoting the selection of an item of claim 1, wherein said consumer market data comprises consumer purchase information.

13. The method of promoting the selection of an item of claim 12, wherein said step of determining one or more representative uses of said item by said predetermined type of consumer during said one or more representative activities comprises analysis of said consumer purchase information.

14. The method of promoting the selection of an item of consumer of claim 1, wherein the selection of messaging comprises messaging promoting said item as addressing a need associated with said one or more representative uses.

15. The method of promoting the selection of an item of consumer of claim 1, wherein the selection of messaging comprises messaging associating said item with said one or more representative activities.

16. The method of promoting the selection of an item of claim 1, wherein the selection of brands comprises selection of one or more brands of said item.

17. The method of promoting the selection of an item of claim 16, wherein said one or more brands comprise predetermined beverage brands.

18. The method of promoting the selection of an item of claim 16, wherein said one or more brands of said item is a liquid selected from the group consisting of coffee; tea; water; fruit, vegetable and juice concentrates; fruit, vegetable and juice beverages; isotonic beverages; non-isotonic beverages; milk and milk byproducts; carbonated soft drinks; and soft drink concentrate.

19. The method of promoting the selection of an item of claim 16, wherein the selection of one or more brands comprises selection of one or more food and beverage brands.



20. (Cancelled)

21. The method of promoting the selection of an item of claim 1, wherein the selection of packaging comprises selection of a predetermined package.

22. The method of promoting the selection of an item of claim 1, wherein said packaging comprises immediate consumption packaging.

23. The method of promoting the selection of an item of claim 1, wherein said packaging comprises future consumption packaging.

24. (Cancelled)

25. The method of promoting the selection of an item of claim 1, wherein said merchandising comprises bundling the location of said item with a different item.

26. The method of promoting the selection of an item of claim 25, further comprising messaging promoting said bundling of said item with said different item.

27. The method of promoting the selection of an item of claim 1, wherein said merchandising comprises bundling the offering of said item with a different item.

28. The method of promoting the selection of an item of claim 27, further comprising messaging promoting said bundling of said item with said different item.

29. (Cancelled)

30. The method of promoting the selection of an item of claim 1, wherein said messaging comprises media advertising.

31. The method of promoting the selection of an item of claim 30, wherein said messaging is advertising selected from the group consisting of print; radio, television, satellite and cable broadcasting; Internet, e-mail, and computer transmissions; telecommunications; event-based marketing; and direct mail.

32. The method of promoting the selection of an item of claim 1, wherein said messaging comprises in-store displays.

33. The method of promoting the selection of an item of claim 1, wherein said messaging comprises out-doors displays.

34. The method of promoting the selection of an item of claim 1, wherein said messaging comprises the name of said item and said one or more representative uses.

35. The method of promoting the selection of an item of claims 1, wherein said messaging comprises the name of said item and said one or more representative activities.

36. The method of promoting the selection of an item of claim 1, further comprising the step of determining an environment in which said item is offered.

37. The method of promoting the selection of an item of claim 36, wherein said environment comprises a retail environment.

38. The method of promoting the selection of an item of claim 36, wherein said environment comprises a virtual environment.

39. The method of promoting the selection of an item of claim 36, further comprising the step of determining the manner in which said predetermined type of consumer selects said item in said environment.

40. The method of promoting the selection of an item of claim 39, wherein said step of determining the manner in which said predetermined type of consumer selects said item in said environment comprises consumer intercept surveys.

41. The method of promoting the selection of an item of claim 39, wherein said step of determining the manner in which said predetermined type of consumer selects said item in said environment comprises analysis of transactional data.

42. The method of promoting the selection of an item of claim 39, wherein said manner in which said predetermined type of consumer selects said item comprises a purchasing trip selected from the group consisting of quick mission trips, quick meal solution trips, and stock-up trips.

43. The method of promoting the selection of an item of claim 39, wherein said step of creating demand for said item comprises displays located at a location distant from said environment.

44. A computer-readable medium having computer-executable instructions for performing the steps recited in claim 1.

45. A computer-readable medium having computer-executable instructions for performing the steps recited in claim 39.

46. - 58. (Cancelled)

59. A method for promoting the use of an item by a predetermined type of consumer, said method comprising the steps of:

receiving consumer lifestyle data corresponding to representative activities of said predetermined type of consumer;

storing said data corresponding to said representative activities of said predetermined type of consumer in a marketing database;

receiving consumer market data corresponding to representative uses of said item by said predetermined type of consumer;

storing said data corresponding to said representative uses of said item by said predetermined type of consumer in said marketing database;

receiving a selection of messaging, brands, packaging, or merchandising associated with the item;

storing the selection of messaging, brands, packaging, or merchandising associated with the item in said marketing database;

determining a relationship between said data corresponding to said representative activities of said predetermined type of consumer and said data corresponding to said representative uses of said item by said predetermined type of consumer activities with the selection of messaging, brands, packaging, or merchandising via a processor in communication with the marketing database so as to increase demand of the item by the predetermined type of consumer; and

storing said relationship in said marketing database.

60. The method for promoting the use of an item of claim 59, further comprising the step of creating messaging associating said item with said relationship.

61. The method for promoting the use of an item of claim 60, further comprising the step of storing said messaging in said marketing database.

62. The method for promoting the use of an item of claim 61, further comprising the steps of receiving data corresponding to a conversion rate of said predetermined types of consumers in response to said messaging associating said item with said relationship and storing said data corresponding to said conversion rate of said predetermined types of consumers in said marketing database.

63. The method for promoting the use of an item of claim 62, further comprising the steps of receiving data corresponding to the average transaction amount for said item and storing said data corresponding to said transaction amount in said marketing database.

64. The method for promoting the use of an item of claim 63, further comprising the steps of receiving data corresponding to the average gross profit margin for said item and storing said data corresponding to said average gross profit for said item in said database.

65. The method for promoting the use of an item of claim 64, further comprising the step of determining the value of said messaging via said processor based upon said conversion rate, said average transaction amount for said item, and said average gross profit margin for said item.

66. (Withdrawn) A system for facilitating the use of an item by a predetermined type of consumer comprising:

a storage device; and

a processor connected to said storage device,

said storage device storing a program for controlling the processor;

said storage device storing data representing one or more activities of said predetermined type of consumer;

said storage device storing data representing one or more needs of said predetermined type of consumer for said item;

said storage device storing data representing one or more marketing solutions promoting the use of said item by said predetermined type of consumer based upon the selection of messaging, brands, packaging, or merchandising; and

said processor operative with said program to receive a request for said one or more marketing solutions based upon said one or more activities or said one or more needs of said predetermined type of consumer and to provide said one or more marketing solutions.

67. (Cancelled)

## **Evidence Appendix**

NONE.

**Related Proceedings Appendix**

NONE.